

Office Supreme Court, U.S.

FILED

JAN 15 1965

JOHN F. DAVIS, CLERK

IN THE U. S.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 313

JESSE ELLIOTT DOUGLAS,

Petitioner

V.

STATE OF ALABAMA,

Respondent

**ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF ALABAMA
BRIEF AND ARGUMENT OF RESPONDENT**

RICHMOND M. FLOWERS
Attorney General of Alabama

PAUL T. GISH, JR.
Assistant Attorney General
of Alabama

COUNSEL FOR RESPONDENT

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provision Involved	2
Statement of the Case	2
Argument	7
Conclusion	11
Certificate	12

TABLE OF CASES

Page

<i>Adamson v. California</i> , 232 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903	10
<i>Beck v. Washington</i> , 369 U. S. 541, 82 S. Ct. 955, 8 L. Ed. 2d 98	8
<i>Douglas v. State of Alabama</i> , 2nd Division 61, 163 So. 2d 477	1
<i>Douglas v. State of Alabama</i> , 2nd Division 453, 163 So. 2d 496	1
<i>Edelman v. California</i> , 344 U. S. 357, 73 S. Ct. 293, 97 L. Ed. 387	10
<i>Ellis v. State</i> , 38 Ala. App. 379, 86 So. 2d 842	10
<i>Ex parte Loyd (Ala.)</i> , 155 So. 2d 519	8
<i>Glenn v. State</i> , 157 Ala. 12, 47 So. 1034	8
<i>Hedgcbeth v. North Carolina</i> , 334 U. S. 806, 68 S. Ct. 1185, 92 L. Ed. 1739	10
<i>Namet v. United States</i> , 373 U. S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278	8
<i>Nichols v. State</i> , 267 Ala. 217, 100 So. 2d 750	10
<i>Pope v. State</i> , 39 Ala. App. 42, 96 So. 2d 441	10
<i>Robinson v. State</i> , 40 Ala. App. 191, 108 So. 2d 188	10
<i>United States v. Cioffi</i> , 242 Fed. 2d 472	9
<i>United States v. Gernie</i> , 252 Fed. 2d 661, cert. denied, 356 U. S. 968, 78 S. Ct. 1006, 2 L. Ed. 2d 1073	9
<i>United States v. Romero</i> , 249 Fed. 2d 371	9
<i>Woodard v. State</i> , 253 Ala. 259, 44 So. 2d 241	8

STATUTES CITED

Code of Alabama 1940, as Recompiled 1958,
Title 14, Section 38 3

United States Code, Judiciary and Judicial
Procedure, Title 28, Section 1257 (c) 2

6

2

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 313

JESSE ELLIOTT DOUGLAS,

Petitioner

V.

STATE OF ALABAMA,

Respondent

BRIEF AND ARGUMENT OF
RESPONDENT ON THE MERITS

I

OPINIONS BELOW

The opinion of the Court of Appeals of Alabama is reported as *Jesse Elliott Douglas v. State of Alabama*, 2nd Division 61, 163 So. 2d 477.

The case was decided on October 8, 1963. An application for rehearing in the Court of Appeals of Alabama was denied without opinion on November 12, 1963. A petition for writ of certiorari was filed in the Supreme Court of Alabama and the writ was denied on March 26, 1964. *Jesse Elliott Douglas v. State of Alabama*, 2nd Division 453, 163 So. 2d 496. An application for rehearing in the Supreme Court of Alabama was denied without opinion, on April 30, 1964.

II

JURISDICTION

The petitioner has been granted a writ of certiorari from this Honorable Court to review the judgment of the Court of Appeals of Alabama, rendered, October 8, 1963, rehearing denied November 12, 1963, under the provisions of Title 28, Section 1257(c), United States Code, Judiciary and Judicial Procedure.

III

QUESTION PRESENTED

This Honorable Court has granted a writ of certiorari to consider the following issue:

Whether the petitioner, who stands convicted in a State court of assault with intent to murder, was denied due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States by virtue of the fact that the prosecutor was allowed to question an accomplice as a witness for the State at petitioner's trial concerning the contents of a written statement made by the accomplice to law enforcement officers.

IV

CONSTITUTIONAL PROVISION INVOLVED

Petitioner alleges a denial of rights guaranteed to him by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

V

STATEMENT OF THE CASE

Petitioner was indicted by a Grand Jury of Dallas County, Alabama, for the offense of assault with intent to murder.

Title 14, Section 38, Code of Alabama 1940, as Recompiled 1958. After hearings thereon, petitioner's motion to quash the indictment and his motion for a continuance were overruled. Upon arraignment a plea of not guilty was entered and trial was had before a jury which returned a verdict of guilty as charged in the indictment. In accordance with the verdict of the jury, the trial court rendered an adjudication of guilt and sentenced petitioner to imprisonment for a period of twenty years, whereupon notice of appeal was given. Subsequently, the trial court overruled petitioner's motion for a new trial.

Prior to the introduction of any evidence on the merits, hearings were conducted on petitioner's motion to quash the indictment and on his motion for a continuance. The State pleaded the general issue to the motion to quash, and the testimony of three grand jurors who returned the indictment was introduced. The testimony of these witnesses tended to show that, when the case was presented to the grand jury, the Sheriff of Dallas County, Alabama, testified before said jury and there was exhibited a statement which had been signed voluntarily by an alleged accomplice of petitioner, together with a shotgun shell hull. Petitioner's attorney was not allowed to inquire into the details of the evidence presented to the grand jury.

The only evidence introduced at the hearing on the motion for a continuance were several newspaper articles in which were reported the trial of petitioner's alleged accomplice.

This case arises out of the shooting of a truck driver in Dallas County, Alabama, near the intersection of Highway 5 and Highway 80, at approximately 2:30 a.m., January 18, 1962.

The evidence tends to show that about midnight on January 17, 1962, one C. L. Warren, who was employed by West

Brothers Motor Express and who was a member of Teamsters Union, Local 612, left Birmingham driving a Bowman Transportation Company tractor-trailer type transport truck. He was headed South through Alabama, his destination being New Orleans, Louisiana. There were other trucks making this same trip, and one Edward Gorff was driving a truck immediately behind the one driven by Warren.

After leaving a truck stop near Centreville, Alabama, Warren and Gorff noticed a 1959 Ford Galaxie, which carried a Jefferson County, Alabama, license plate, as it passed them, headed South in the same direction as their two trucks. Gorff noticed that this Ford's right tail light was not burning and that a black object lay on its back window shelf. A short time after this car had passed the trucks, a car of the same description was seen by Gorff headed North toward Warren and him. As this car met Warren's truck, there were fired from the car shots which hit the truck and also hit Warren in the arm and in the chest. Gorff stopped his truck to assist Warren and to see that he received medical attention. Warren was hospitalized for twelve days, during most of which time he was in a critical condition.

After the crime has been committed, State Highway Patrolman J. E. Williamson set up a road block at the intersection of Highway 5 and Highway 11 in Bibb County, Alabama, and examined all vehicles for weapons. At 5:00 a.m., on January 18, 1962, he stopped a four-door 1959 white Ford automobile occupied by petitioner, who was a passenger, and one Olen Ray Loyd, who was the driver. Williamson, who found a shotgun and a small box of high velocity shells in the automobile, made a record of his findings and allowed the automobile, which bore an Etowah County, Alabama, license tag, to proceed on its way. As the car was driven off, Williamson noticed that it had only one tail light burning. Later that day in Anniston, Alabama, he examined an auto-

mobile and identified it as the one in which petitioner and Loyd had been riding when they were stopped by him at the road block.

At approximately 8:00 a.m., January 18, 1962, after an alert for the car had been broadcast, petitioner and Loyd were stopped by a police officer in Ohatchee, Calhoun County, Alabama, and were taken by patrol officers to the State Highway Patrol office in Anniston, Alabama, where they were held for the Dallas County, Alabama, sheriff. There it was found that a Jefferson County, Alabama, license plate had been placed under the front floor mat on the driver's side of the car. This car, which was a white 1959 Ford Galaxie, the right tail light of which was disconnected, bore an Etowah County, Alabama, tag and had on its back window shelf an umbrella. Other articles, including three guns and shotgun shells, were also found in various parts of the car.

Petitioner and Lloyd were taken from Anniston, Alabama, to Birmingham, Alabama, where they were turned over to the Sheriff of Dallas County, Alabama, who had warrants for their arrest. They were then taken to Seelma, Alabama, and placed in the county jail.

The Ford automobile in which petitioner was riding when he was stopped in Calhoun County, Alabama, was brought to Montgomery, Alabama, and there examined by a State criminalist. At the trial a large number of pictures of the automobile and many articles, including two shotguns and a license plate, which were taken from the automobile, were introduced into evidence.

A shotgun shell hull, which had been fired from a gun found in petitioner's car, was found in the vicinity of the crime by local law enforcement officers and was introduced into evidence by the State.

The State of Alabama called Olen Ray Loyd as a witness against the petitioner. On the day preceding the petitioner's trial, a jury had found Loyd guilty of assault with intent to murder. He was asked twenty-one questions concerning the entire contents of a statement shown to have been made voluntarily to law enforcement officers at the Dallas County, Alabama, jail. He refused to answer these questions on constitutional grounds and refused to affirm or deny that he had made said statement.

According to Loyd's statement, on the night of January 17, 1962, he and petitioner went from Gadsden, Alabama, to Birmingham, Alabama, where they were instructed to fire upon the tractors pulling Bowman Transportation Company trailers which were traveling from Birmingham through South Alabama, inasmuch as Teamsters Union, Local 612, of which they were members, was on strike against Bowman. In Birmingham, Loyd was given a Jefferson County, Alabama, license plate to place on his automobile and he was also furnished a tank full of gasoline, both by one Sam Webb, President of Teamsters Union, Local 612. Loyd and petitioner left Birmingham at about the same time that the trucks started their trip to New Orleans, Louisiana, and they saw these trucks several times, but did not fire upon them until they were in Dallas County, Alabama. Loyd was driving the automobile at the time the petitioner fired the shot which hit Warren and his tractor.

A qualified criminalist, trained in firearms identification, testified that ammunition found in Loyd's car contained similar elements in the same proportions as the ammunition fragments found inside the cab of Warren's tractor and in his body; that the shotgun shell hull found in the vicinity of the crime has been fired from gun found in Loyd's car; and that test firings indicated that the shots which hit Warren's

tractor had been fired from a distance of not greater than eight feet.

After Loyd left the witness stand, the State of Alabama called four law enforcement officers who testified that Loyd's statement was given and signed voluntarily in their presence.

Petitioner did not offer any evidence in his own behalf.

VI

ARGUMENT

It is the position of the State of Alabama that the question presented for review in this case is whether the petitioner was denied due process of law by virtue of the fact that the prosecutor was allowed to question an accomplice as a witness for the State at petitioner's trial concerning the contents of a written statement made by the accomplice to law enforcement officers. There is nothing in the record to indicate that the prosecutor knowingly called the accomplice to the stand to secure from him a refusal to testify or to use his presence on the stand as a pretense for reading to the jury a statement which was inadmissible against the petitioner (See page 2 of petitioner brief). The record in this case does show that the prosecutor vigorously tried the petitioner.

The State prosecuting attorney may, without depriving the accused of due process of law, question an accomplice concerning the contents of a statement made by the accomplice to law enforcement officers after the witness has been declared hostile by the court.

In this case, Loyd, an accomplice, was found guilty the day before petitioner was put to trial. He was called as a witness against the petitioner. After answering preliminary

questions, some straightforwardly, and others by stating "Not to my knowledge" or "I am not sure," Loyd was confronted with his written statement and was asked twenty-one questions concerning the contents of said statement. These questions covered the entire statement. Loyd refused to answer any of these questions invoking his privilege against self incrimination. See *Ex parte Loyd*, (Ala.) 155 So. 2d 519.

As was held by the Court of Appeals of Alabama in this case, it is within the discretion of the trial court to allow a party to refresh the memory of a hostile witness by calling his attention to a prior statement. *Glenn v. State*, 157 Ala. 12, 47 So. 1034; and *Woodard v. State*, 253 Ala. 259, 44 So. 2d 241.

Under Alabama procedure counsel may not state in the presence of the jury that a witness made a previous inconsistent statement. However, a party for the purpose of showing his surprise or of refreshing the recollection of his witness may ask the witness whether he made a certain statement on a prior occasion. While it is decidedly improper for an attorney to declare that a witness made a prior statement, it is not improper to ask the witness whether he made such statement.

Since Loyd's privilege against self incrimination was personal the petitioner had no right to invoke such privilege. *Namet v. United States*, 373 U. S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278. Cf. *Beck v. Washington*, 369 U. S. 541, 82 S. Ct. 955, 8 L. Ed. 2d 98. If Loyd had chosen to answer the prosecutor's questions, the petitioner would have been confronted with testimony legal to use against him.

A witness who has been convicted of a crime arising out of the transaction in question may no longer claim the privilege against self incrimination and may be compelled to

testify. *United States v. Cioffi*, 242 Fed. 2d 472; *United States v. Romero*, 249 Fed. 2d 371; and *United States v. Gernie*, 252 Fed. 2d 664, cert. denied, 356 U. S. 968, 78 S. Ct. 1006, 2 L. Ed. 2d 1073.

The petitioner in this case suggests that the prosecuting attorney knowingly called Loyd to the stand for the purpose of wringing from him a refusal to testify. It is respectfully submitted that the record in this case does not justify petitioner's position. It is common knowledge among both defense and prosecuting attorneys that it is impossible to predict the testimony of convicted accomplices. There have been many instances in which such a witness has refused to testify until after he is called to the stand and then changed his mind. In these instances many an accomplice have provided the jury with the true facts out of which the case arose.

It should here be pointed out that the attorney representing the petitioner and Loyd, at the time of the trial of the case at bar, while objecting to the use of Loyd's statement prior to the examination of the witness, did not object to the questions propounded to Loyd concerning the contents of said statement. After Loyd refused to answer all twenty-one questions said attorney moved the trial court to allow Loyd to purge himself of possible contempt.

After Loyd left the witness chair the State examined two local law enforcement officers and an agent for the Federal Bureau of Investigation without objection. These witnesses testified that Loyd gave the statement, used by the prosecuting attorney, in their presence on January 20, 1962. The State did not attempt to introduce said statement into evidence at the petitioner's trial.

In this state of the record, we respectfully submit that

there was no denial of petitioner's right to due process of law. Error cannot be predicated upon adverse rulings of the trial court where the specific grounds of objections are not apt, unless the evidence sought is inadmissible for any purpose. *Ellis v. State*, 38 Ala. App. 379, 86 So. 2d 842; *Pope v. State*, 39 Ala. App. 42, 96 So. 2d 441; *Robinson v. State*, 40 Ala. App. 101, 108 So. 2d 188; and *Nichols v. State*, 267 Ala. 217, 100 So. 2d 750.

Where the affirmance of a conviction in a state court is rested upon an adequate ground under state procedure, this Honorable Court has held that no question of the denial of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States is presented. *Edelman v. California*, 344 U. S. 357, 73 S. Ct. 293, 97 L. Ed. 387. Cf. *Hodgebeth v. North Carolina*, 344 U. S. 806, 68 S. Ct. 1185, 92 L. Ed. 1739.

This Honorable Court has held that a state may regulate the procedure of its courts in accordance with its own concept of policy and fairness, unless it offends some principle of justice ranked as fundamental.

This Honorable Court has also held that the privilege against self incrimination is not inherent in the right to a fair trial and is, therefore, not protected by the due process clause of the Fourteenth Amendment to the Constitution of the United States. *Adamson v. California*, 232 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903.

For the above reasons, we respectfully submit that no principle of fundamental justice was offended by the rulings of the trial court in the instant case. We submit that the State of Alabama may examine a convicted accomplice concerning

the contents of a prior written statement made by him without violating the due process clause of the Fourteenth Amendment to the Constitution of the United States.

VII

CONCLUSION

Premises considered, we respectfully submit that there is no denial of the petitioner's right to due process of law in this case. Therefore, this case should be affirmed.

Respectfully submitted,

RICHMOND M. FLOWERS

Attorney General of Alabama

PAUL T. GISH, JR.

Assistant Attorney General
of Alabama

COUNSEL FOR RESPONDENT

CERTIFICATE

I, Paul T. Gish, Jr., one of the attorneys for respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 13th day of January 1965, I served a copy of the foregoing brief and argument, on one of the attorneys for the petitioner, by mailing a copy in a duly addressed envelope, to said attorney of record, as follows:

To: Honorable Charles Cleveland
Attorney at Law
Fifteenth Floor Empire Building
Birmingham, Alabama 35203

PAUL T. GISH, JR.

Assistant Attorney General
of Alabama
Administrative Building
Montgomery, Alabama 36104